

Employment Update

Private detectives as agents provocateurs

8th June 2020

Regarding the 19th February 2020 Supreme Court decision

The 19th February 2020 Supreme Court ruling of (Case Gestinova 99 S.L. RCU 3943/2017) has annulled the report of a private detective that served as a precedent for the High Court of Justice of Andalusia on July 13th 2017 (SR 325/2017) to declare the dismissal of a worker to be appropriate, agreeing to return the proceedings to the Chamber of origin so that, also based on the true non-documentary nature of the detective's report, whose practice should not have been admitted due to its manifest illegality, it can decide in the new ruling on the company appeal.

The key to the High Court's finding that the report is unlawful evidence, with no legal value, is that the private detective hired by a company forced a mock professional interview with a worker to prove that he was self-employed as a lawyer during his working day.

The following background information is of interest:

a.- Granada Labour Court No. 1 understood that the disciplinary dismissal was inappropriate and that the worker's action was not punishable, since it was caused by the detective who, despite the appellant's refusal to hold the interview during his working hours, insisted until he managed to have the professional consultation carried out during that time.

b.- The Andalucía Supreme Court ruling under appeal considered that the evidence now annulled was lawful since it served to establish that the applicant was carrying out professional activities as a lawyer during his working day. Furthermore, it modified the proven facts of the judgment of the Court of First Instance by attributing the condition of documentary evidence to the written report of the detective.

c.- The proven facts show that the company hired a detective who contacted the worker, pretending to ask for a professional consultation, the purpose of which was to prove that he was self-employed during his working day. The worker, who was registered with the Granada Bar Association, offered to meet on Friday afternoon or Saturday morning, outside working hours, but the detective refused. After several phone calls, he got a professional appointment on Monday 30th November 2015 at 6 p.m., within his working day, in the office of another lawyer. The worker was dismissed on disciplinary grounds on 18th December 2015.

What is the doctrine established by the Supreme Court? It stresses that the evidence (detective's report) is:

"unlawful, in that the promotion of a simulated consultation, implemented by a private detective hired by the company, to prove that the plaintiff was practicing law on his own account during working hours, forced over and over again by the detective, who refused to see the plaintiff outside of his working hours, constituted a clear coercive action on the will of the worker, as well as the use of unlawful or ethically reprehensible procedures, which violated the right to dignity of the worker, guaranteed by Article 10 SC, as well as his free and self-determination".



It adds that such evidence should not have been admitted by the judgment under appeal, nor should it have been allowed to have full evidentiary effect, since the judicial body cannot base its decision on evidence obtained, directly or indirectly, in violation of fundamental rights and public freedoms, and public liberties, there being multiple pronouncements that have incorporated the Anglo-Saxon doctrine of the "fruit of the poisoned tree", by virtue of which the judge is forbidden to assess not only the evidence obtained in violation of a fundamental right, but also that derived from it.

On the other hand, the Supreme Court disagrees with the High Court of Justice's criterion, which modified a proven fact by attributing documentary value to the detective's report. In this regard, it recalls its doctrine regarding the legal nature of this type of report, which, even if presented in writing, must be evaluated as witness evidence, and has no usefulness for modifying the proven facts by way of a plea. It reiterates that writings reflecting statements by third parties cannot, in principle, be considered as documentary evidence for the purposes of factual revision in lieu.

The debate has been opened up. The heart of the controversy lies in whether the intervention of private detectives, when they interact or communicate directly and personally with the worker under investigation, is part of a "provoked offence" (SC thesis) or that the position of the company and the report issued by the Detective Agency were lawful because they were seeking the "establishment of a suspected offence and a way to prove it" (Andalusian Supreme Court thesis). In these cases, the detective hired by the company acts as what is doctrinally known as an "agent provocateur", which has its origin in criminal law and is also included in employment law to assess the conduct that is accused of justifying the imposition of the sanction of dismissal

It is not possible to conclude from the preceding jurisprudential doctrine the conclusion that when there is interaction between an agent provocateur (detective) and the worker under investigation, the evidence obtained is automatically illicit.

It will be necessary to distinguish if in this inducement to perform a certain behaviour there is clearly a coercive action on the will of the worker. Only if this is the case should the evidence be considered illegal. It is quite different if the worker voluntarily and spontaneously assumes the execution of all the steps entrusted to him by the detectives, in which case he would not be present when faced with a "provoked infraction" (Murcia High Court of Justice ruling, 21-6-2017; SR 306/2017).

We understand that if you prove (which was not the case examined by the SCR) that simply with the action of the detectives a previously existing behaviour independent of the referred action has surfaced, without any intimidation, we would not be facing a coercive action on the will of others.

In other words, there would be no unlawfulness in the actions of the private detectives when it comes to discovering breaches of duty that have already been committed or are in the process of being committed, because in such cases the detective is not trying to provoke the commission of a breach of duty, but rather to discover what has been committed, what is being committed or what is in the process of being committed, in an attempt to unmask the plot and obtain evidence of an activity about which there are well-founded suspicions. Two real examples will clarify this assertion better.

The first, obtained from the 16th May 2018 Aragon Supreme Court Ruling (SR 238/2018). In view of the complaint that the evidence of non-compliance was induced by a detective and should therefore be declared illegal, we were told in the legal grounds of the ruling that:

"It was not induced evidence. The detective did not cause the plaintiff to act against the law, but rather was another user of his medical services, which were advertised on the Internet and which he had been



providing previously, limiting himself to observing how the plaintiff was providing medical care to the patients who requested it in the aforementioned public consultation. His intervention made it possible to prove that the plaintiff was violating the non-competition agreement that prohibited the plaintiff from providing cosmetic surgery services for other natural or legal persons during the term of his contract with the defendant company".

The same approach of no "deception" in the investigative action, that resolved in the June 3rd 2019 Castilla-La Mancha Supreme Court Ruling (SR 338/2019):

"Applying the previous doctrine to the case in question, it appears that the detective did not provoke any behaviour that the worker would not have done otherwise, but simply presented a demand for services that the interested party itself offered on the Internet as a professional, and was doing so in the terms already described. Nothing was provoked, but rather a simple act of verification was carried out, in the face of which the interested party did not declare that he did not engage in such activity, but rather that he "did not know when it might happen", adjusting the appointment after another call".

In short, the Supreme Court Ruling that is the subject of this commentary does not represent a significant change from the previous judicial doctrine on the subject. In fact, its reasoning does not preach that the reports of private detectives are illegal when there is an interaction with the investigated party; there must be a specific case, with no provocation that leads to their illegality when the offending will has already arisen, and is known or suspected by the company, and the detective, without any coercion over the will of the worker, limits himself to seeking evidence of such action, thus distinguishing between the breach caused and the breach proven.

You can see the full text of the above-mentioned judgment [here](#).

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